IN THE IOWA DISTRICT COURT FOR POLK COUNTY

NAVIGATOR HEARTLAND GREENWAY LLC, Plaintiff, v. IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA, Defendant.	CASE NO. EQCE088024 **PLAINTIFF'S BRIEF IN SUPPORT OF RESISTANCE TO MOTION TO INTERVENE AND COUNTER-MOTION TO STRIKE INTERVENTION PETITION**

COMES NOW Plaintiff, Navigator Heartland Greenway LLC ("Navigator"), through its undersigned counsel, and for its Resistance to the Motion to Intervene filed by Sierra Club Iowa Chapter ("Sierra Club") and in support of its Counter-Motion to Strike Intervention Petition, states that Sierra Club's Motion should be denied in its entirety and Navigator's Counter-Motion to Strike should be granted in its entirety.

INTRODUCTION

Navigator is seeking an injunction pursuant to Iowa Code §§ 22.5 and 22.8 to protect the confidentiality of its mailing lists, which were recently requested to be disclosed pursuant to open records requests under the Iowa Open Records Act (the "Act"), Iowa Code chapter 22, submitted to Defendant, the Iowa Utilities Board (the "IUB" or "Board"), by multiple parties—none of whom were Sierra Club. *See* Iowa Utilities Board, *In re: Navigator Heartland Greenway LLC*, Notice of Records Request, Docket No. HLP-2021-0003 (Aug. 24, 2022). On September 16, 2022, the Court entered a temporary injunction preventing disclosure of any of the information sought in those open records requests made by others. On November 2, 2022, Sierra Club filed a Motion to

Intervene in this case. Sierra Club separately filed an Intervention Petition ("Intervention Petition") and the Affidavit of Jessica Mazour (the "Mazour Affidavit").[1] Sierra Club's request to intervene must be denied under the standards set forth in both Rules 1.407(1) and 1.407(2) of the Iowa Rules of Civil Procedure. Because Sierra Club separately filed an Intervention Petition without having approval or permission to intervene in this case, and because Sierra Club should not be allowed to intervene in this case, its Intervention Petition and the Mazour Affidavit must be stricken from the record in their entirety.

BACKGROUND

Navigator is a "pipeline company" within the meaning of Iowa Code Chapter 479B who has developed a proposal to build and operate a large-scale carbon capture pipeline system in Iowa, which is currently pending before the IUB. In Iowa, the IUB has primary jurisdiction over the location and route of hazardous liquids pipelines in Iowa (among other things), and a company proposing to build a hazardous liquid pipeline must obtain a permit from the IUB under Iowa Code chapter 479B.

Pursuant to Iowa Code chapter 479B and the Board's administrative rules implementing the statute, 199 Iowa Admin. Code Ch. 13, the first step in seeking a permit for carbon capture infrastructure project of this nature is to hold a public informational meeting in each county where the pipeline is proposed to be constructed and operated, and notice of the meetings must be sent via certified mail to "persons as listed on the tax assessment rolls as responsible for payment of real estate taxes imposed on the property and those persons in possession of or residing on the property in the corridor in which the pipeline company intends to seek easements." 199 Iowa Admin. Code 13.2(5) (implementing Iowa Code § 479B.4). Notably, however, nothing in the

[1] For ease of reference, Navigator will collectively refer to the Intervention Petition and the Mazour Affidavit herein as the "Intervention Petition".

statute or the rules requires or contemplates the filing of the list of persons on which the mailing was based to be filed with the Board.

As set forth in the Affidavit of Monica Howard, dated September 7, 2022, and attached to Plaintiff's Petition for Temporary and Permanent Injunctive Relief in this case, Navigator has taken—and is still taking—numerous time-consuming and expensive steps to comply with the good-faith requirements of Iowa Administrative Code 199 - 13.2(5)(d) to locate, update, and ensure accuracy of the addresses of all affected and potentially affected persons on its proposed route. Overall, this process involves significant resources and goes well beyond merely obtaining a list of landowners from each county. In fact, to date, Navigator estimates it has expended approximately $3.67 million to develop, update, and maintain the landowner lists for the corridor. Moreover, Navigator strategically determined a project corridor that it believes serves interested customers, maximizes the collective benefit, and minimizes the collective impact of the line. Navigator's corridor and its resulting mailing lists are kept confidential on purpose and utilized for sending legally required notices to landowners. Sierra Club has no real legal interest in the confidentiality of Navigator's proprietary mailing lists, especially as it was not one of the parties that submitted an open record request. Allowing Sierra Club to intervene in this case serves no purpose and will only delay resolution of the claims and matters at issue, and increase the costs to those involved.

ARGUMENT

I. Sierra Club is not entitled to intervene as of right under Rule 1.407(1)(b).

No statute confers an unconditional right for Sierra Club to intervene in this case. As a result, Iowa R. Civ. P. 1.407(1)(a) does not apply and provides no justification for Sierra Club to intervene in this case.

A nonparty may also intervene as a matter of right **only** when they have an "interest" in the subject of the litigation or the success of either party to the lawsuit. Iowa R. Civ. P. 1.407(1)(b). Specifically, this rule provides that that an application for intervention must be granted:

> [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Iowa R. Civ. P. 1.407(1)(b).[2] However, the interest must be more than speculative or contingent. *In re Estate of DeVoss*, 474 N.W.2d 539, 542 (Iowa 1991). It has been noted that one is "interested" in the pending litigation "if one has a *legal right* that the proceeding will *directly affect*." *In Interest of A.G.*, 558 N.W.2d 400, 403 (Iowa 1997) (citations omitted) (emphasis in original); *see also State ex rel. Miles v. Minar*, 540 N.W.2d 462, 465 (Iowa App. 1995) ("[The interest] must be derived from some legal right or liability which would be impacted by the judgment sought by the parties."). A legal interest, then, must be more than the mere desire to weigh in on an ongoing lawsuit.

In its Petition, however, Sierra Club merely expressed a desire to participate in this action, which is insufficient to warrant intervention as of right, while completely failing to articulate a legal argument as to its alleged right to intervene. The Petition does not identify any protectible legal interest, nor does Sierra Club explain how such interest would be impaired by the confidentiality of the mailing lists. Furthermore, there is no indication that the Defendant Iowa Utilities Board or another party would fail to adequately represent Sierra Club's interest, to the extent the Sierra Club has any interest. Finally, Sierra Club is not one of the parties who submitted

[2] Sierra Club does not specify which subpart of Rule 1.407(1) should apply. However, since no statute conferring "an unconditional right to intervene" was cited in the Petition—or, indeed, exists—Navigator assumes Sierra Club is applying to intervene only under Rule 1.407(1)(b).

an open records request that are at issue in this case. Accordingly, Sierra Club's request to intervene as of right must be denied.

A. Sierra Club does not possess a directly affected legal interest sufficient to intervene as of right.

As noted above, there is only one subsection of Iowa Rule of Civil Procedure 1.407(1) that could even potentially apply and that is subsection (b). Subsection (b) authorizes intervention as of right where the proposed intervenor "claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." Iowa R. Civ. P. 1.407(1)(b). Before a third party can intervene in an ongoing case, then, a court "must be certain that the applicant has asserted a legal right or liability that will be directly affected by the litigation." *In re H.N.B.*, 619 N.W.2d 340, 343 (Iowa 2000) (citations omitted). An indirect, speculative, or remote interest, in contrast, does not confer a right to intervene. *See State ex rel. Miles*, 540 N.W.2d at 465 (citations omitted).

Perhaps in recognition of the absence of any specific legal interest, Sierra Club failed to cite any case law in its Motion or Petition. Conspicuously absent is also any reference to Sierra Club's motion to intervene in the injunction action of Summit Carbon Solutions, LLC ("Summit"), another pipeline company with a Petition for Hazardous Liquid Pipeline before the Board[3] that has also taken the position that landowner mailing lists should be confidential. *See Summit Carbon Solutions, LLC v. Iowa Utils. Bd.*, No. CVCV 062900 (Polk County District Ct.). There, Sierra Club's motion was granted, but the case is easily distinguishable, as Sierra Club must have recognized. In the Summit action, Sierra Club was the party that submitted the open records

[3] *see* Iowa Utilities Board, *In re: Summit Carbon Solutions, LLC*, Docket No. HLP-2021-0001, *available at* https://efs.iowa.gov/efs/ShowDocketSummary.do?docketNumber=HLP-2021-0001

request. That is not the case here, as Sierra Club has not submitted any such open records request for Navigator's mailing lists. For this reason alone, unlike in the Summit injunction action, Sierra Club cannot establish that it the right to intervene in these proceedings due to its lack of interest in the subject matter of this action.

Moreover, Sierra Club's Motion and Petition fail to provide anything other than conclusory statements and a generalized "interest" that are neither factually nor legally sufficient to meet the high burden under Rule 1.407(1)(b). To be sure, ambiguous phrases referencing Sierra Club's work "to help landowners understand their rights and to support any landowners who resist Navigator's efforts to obtain easements from those landowners" Mot. to Intervene ¶¶ 2-3, do appear, but Sierra Club does not explain how this gives them a legal interest in the outcome of this matter that justifies intervention. This case does not involve obtaining or trying to obtain easements in any regard – it has to do with mailing lists requested under specific open records requests.

Further, whether or not the mailing lists remain confidential after this lawsuit is decided, Sierra Club can continue to make contact with affected landowners by word of mouth, *id*. at ¶ 3, which is the most appropriate means given that it allows landowners to "opt into" contact with Sierra Club. Indeed, Sierra Club's involvement in opposing the proposed carbon capture pipelines is well known and documented, such that interested landowners can easily seek them out. *See, e.g*., Jeffrey Tomich, E&E News, *CO2 pipeline developers, foes clash over landowner lists* (Nov. 3, 2022), https://www.eenews.net/articles/co2-pipeline-developers-foes-clash-over-landowner-lists/ [hereinafter E&E News Article]; Sierra Club Iowa Chapter, Carbon Dioxide Pipelines (last visited Nov. 10, 2022), https://www.sierraclub.org/iowa/carbon-dioxide-pipelines. This reality significantly undermines Sierra Club's boilerplate and irrelevant arguments. Indeed, Sierra Club

itself acknowledges that it has been able to accomplish its goals without the having the mailing lists. *See, e.g.*, Mazour Aff. ¶ 2 ("I currently have the names of a few hundred landowners that I have been working with."); E&E News Article ("Even without Summit's landowner list, Mazour said the group has been assembling a strong coalition to oppose the pipeline.").

In short, Sierra Club has no legal right to intervene in this case whatsoever. Its Motion must be denied, and the Intervention Petition should be stricken in its entirety.

B. Sierra Club has not even alleged that its interests are not already adequately represented.

As noted, Sierra Club has no directly affected legal interest that needs protection. As a result, it should not be allowed to intervene as a matter of right and that ends the analysis. However, for argument's sake, even if Sierra Club had established a directly affected legal interest in this lawsuit, which it has not, it has failed to show that its interest will not already be adequately represented. To be eligible to intervene as a matter of right, Sierra Club must "set forth specific interests that only it can protect by intervening." *S. Dakota ex rel Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 786 (8th Cir. 2003) (*citing United States v. Union Elec. Co*., 64 F.3d 1152, 1169 (8th Cir. 1995)). Sierra Club has completely failed to present any colorable argument that its intervention is necessary to represent a specific interest that is not currently represented. Sierra Club's conclusory statement that the IUB has expressed its willingness to keep the lists confidential (Motion, at para. 5) does nothing more than use the IUB's adherence to the administrative rules as a way to bootstrap an intervention in this action. Thus, because Sierra Club failed to "set forth specific interests that only it can protect by intervening," *S. Dakota ex rel Barnett*, 317 F.3d at 786 (*citing Union Elec. Co*., 64 F.3d at 1169), the Court must deny the Petition under Rule 1.407(1)(b).

II. Permissive intervention under Rule 1.407(2) must be denied.

Like with intervention as a right under Iowa R. Civ. P 1.407(1)(a), no statute confers a conditional right for Sierra Club to intervene in this case. As a result, Iowa R. Civ. P. 1.407(2)(a) does not apply and provides no justification for Sierra Club to intervene in this case.

Further, Sierra Club has not alleged that Iowa R. Civ. P. 1.407(2)(c) or any statute or other item mentioned under that rule applies – because none do. Iowa. R. Civ. P. 1.407(2)(c) does not apply and provides no justification for Sierra Club to intervene in this case.

With regards to Iowa R. Civ. P. 1.407(2)(b), the court does have some discretion to grant permissive intervention but only "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common," Iowa R. Civ. P. 1.407(2)(b).[4] However, as noted above, Sierra Club has no question of law or fact in common with the open records requests and the mailing lists at issue in this lawsuit. As a result, permissive intervention must also be rejected.

For argument's sake, even if the Court were to consider permissive intervention, the court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id*. Here, Sierra Club's involvement in this case will do just that—duplicate arguments, prolong litigation proceedings, require additional discovery and potential motion practice, and delay the adjudication of the rights of the original parties, all while failing to advance any interests that would assist the court in resolving this case differently. *See Rants v. Vilsack*, No. CV 4838, 2003 WL 25802812, at *16 (Iowa Dist. Oct. 14, 2003) (denying proposed intervention, finding it "will increase the costs and complexity of this case, the time and burdens

[4] While, again, it is unclear which subpart of Rule 1.407(2) Sierra Club believes applies here, it the outcome in the same regardless. When considering a request to intervene under any subpart of Rule 1.407(2), "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Here, Sierra Club's involvement in this matter would cause undue delay and prejudice the adjudication of the rights of the original parties.

imposed on the Court and the original parties, and will delay the prompt disposition of . . . the sole issue raised in Plaintiffs' Petition"); *see also Menominee Indian Tribe of Wisconsin v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) ("When intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears.").

No matter how Sierra Club tries to package its position, it has no basis for intervening in this case. There is simply no cognizable reason to allow Sierra Club to intervene, especially considering that the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Sierra Club's Motion and its vague allegations fall woefully short in meeting the burden for intervention., Intervention should be denied.

CONCLUSION

Sierra Club does not have the right to intervene in this case. Sierra Club does not qualify for permissive intervention in this case. Therefore, Sierra Club's Motion should be denied in its entirety. Since Sierra Club has no ability to intervene in this case, the Intervention Petition separately filed by Sierra Club should be stricken in its entirety.

WHEREFORE Navigator respectfully requests that this Court deny Sierra Club's Motion to Intervene in its entirety at Sierra Club's costs, grant Navigator's Counter-Motion and strike the Intervention Petition filed by Sierra Club in its entirety, and for such other and further relief as the Court deems fit under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 15, 2022, I electronically filed the foregoing with the Clerk of Court by using the Electronic Document Management System, a copy of which will be electronically served upon all counsel of record registered with EDMS via Notice of Electronic Filing or Presentation.

/s/ Brooke E. Johnson, Legal Assistant